1	THE LAW OFFICES OF RANDOLPH H. GOLDBERG RANDOLPH H. GOLDBERG, ESQ.
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4	Las Vegas, NV 89119 (702) 735-1500
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6	Attorney for Debtor(s)
7	UNITED STATES BANKRUPTCY COURT
8	DISTRICT OF NEVADA
9	In re: Chapter 13 Proceedings Case No.: 09-14668-BAM
	JUAN GONZALEZ &
10	ADRIENNE GONZALEZ
11	Debtor(s). Date: 6/11/2009 Time: 3:30 PM
12	
13	MOTION TO VALUE COLLATERAL, "STRIP OFF" AND MODIFY RIGHTS
14	OF FIFTH THIRD BANK PURSUANT TO 11 U.S.C. §506(a) AND §1322
15	Comes Now the Debtor, JUAN AND ADRIENNE GONZALEZ (hereinafter the "debtor
16 17	by and through THE LAW OFFICES OF RANDOLPH H. GOLDBERG, and respectfully move
18	this Court pursuant to 11 U.S.C. §506(a), and §1322, and Bankruptcy Rules 3012 and 9014.
19	STATEMENT OF FACTS
20	1. Debtor filed the instant Chapter 13. Case Number <b>09-14668</b> on <b>MARCH 31</b>
21	1. Debtor filed the instant Chapter 13, Case Number <b>09-14668</b> on <b>MARCH 31</b> ,
22	2009.
23	2. As of the date of filing, debtor owned real property located at <b>3354 MOUNTAIN</b>
24	BLUEBIRD STREET LAS VEGAS Nevada 89117 (hereinafter the "Subject Property").
25	
26	3. Debtors have obtained a residential appraisal that places the value of the subject
27	property at \$175,000.00.
28	4. At the time of filing the instant petition, the Subject Property was subject to

1 the following liens:

AMERICAS SERVICING COMPANY (First Mortgage): \$219,597.00

FIFTH THIRD BANK (Second Mortgage): \$41,056.00

- 5. Therefore, on the date the instant bankruptcy was filed, no equity existed in the Subject Property above the claims of **FIFTH THIRD BANK** 
  - 6. **FIFTH THIRD BANK's** claim was wholly unsecured on the petition date and if the Subject Property was sold at auction **FIFTH THIRD BANK** would receive nothing.
- 7. Accordingly, the debtor requests that Your Honor find that FIFTH THIRD BANK claim is unsecured and should be reclassified as a general unsecured claim to receive pro rata with other general unsecured creditors through the debtor's chapter 13 plan.

### **LEGAL ARGUMENT**

In *In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002), the Court stated that a wholly unsecured lien holder's claim can be modified and reclassified as a general unsecured claim pursunt to 11 U.S.C. §506(a), despite the anti-modification language in §1322(b)(2). Specifically, the Court held:

Section 506(a) divides creditors' claims into "secured...claims" and "unsecured claims." Although the conventional interpretation of "secured" might include any claim in which the creditor has a security interest in the debtor's property, §506(a) makes clear that the status of a claim depends on the valuation of the property. An allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim. To put it more simply, a claim such as a mortgage is not a "secured claim" to the extent that it exceeds the value of the property that secures it. Under the Bankruptcy Code, "secured claim" is thus a term of art; not every claim that is

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secured by a lien on property will be considered a "secured claim." Here, it is plain that **FIFTH THIRD BANK's** claim for the repayment of its loan is an unsecured claim, because its deed of trust is junior to the first deed of trust, and the value of the loan secured by the first deed of trust is greater than the value of the house.

Accordingly, since **FIFTH THIRD BANK's second** mortgage claim is wholly unsecured (in that there is no extant equity above the first mortgage in the Subject Property), the claim should be reclassified by this Court as a general unsecured claim and share in whatever pro rata distribution is being received. **FIFTH THIRD BANK** should also be stripped of its secured rights under Nevada State Law since no maintainable security interest in the subject property exists.

Furthermore, the Debtor is not required to file an adversary proceeding to strip the lien of its secured status. Debtor may "strip off" **FIFTH THIRD BANK**'s consensual lien by motion.

See In re Williams, 166 B.R. 615 (Bankr.E.D.Va.1994), In re Fuller, 255 B.R.

300(Bankr.W.D.Mich.2000), In re Hoskins, 262 B.R. 693 (Bankr.E.D.Mich.2001), In re King,

290 B.R. 641 (Bankr.C.D.Ill. 2003), In re Millspaugh, 302 B.R. 90 (Bankr.D.Idaho 2003), Dickey

v. Ben. Fin. (In re Dickey) 293 B.R. 360 (Bankr.M.D.Pa.2003), In re Hill, 304 B.R. 800

(Bankr.S.D.Ohio 2003); *In re* 

Sadala 294 B.R. 180 (Bankr.M.D.Fla.2003), In re Fisher, 289 B.R. 544 (Bankr.W.D.N.Y.2003),

In re Robert, 313 B.R. 545 (Bankr. N.D. N. Y. 2004), In re Bennett, 312 B.R. 843

(Bankr. W.D.Ky.2004).

### **CONCLUSION**

Debtors respectfully request that the court:

- 1. Determine that the first mortgage on the subject property exceeds the value;
- 2. Determine that the **FIFTH THIRD BANK second** mortgage claim is a wholly unsecured claim and strip the lien from the subject property pursuant to 11 U.S.C. Section 506(a);
- 3. Reclassify the secured claim filed by **FIFTH THIRD BANK** as a general unsecured claim to be paid pro rata in the general unsecured pool of Debtor's Chapter 13 Plan.
- 4. For such other and further relief which the Court deems just and proper.

DATED this \_\_\_\_\_ of \_\_\_\_\_\_, 2009.

THE LAW OFFICES OF RANDOLPH H. GOLDBERG

By: /s/RANDOLPH GOLDBERG/s/ RANDOLPH H. GOLDBERG, ESQ. 4000 S. Eastern Avenue, Suite 200 Las Vegas, Nevada 89119 Attorney for Debtor(s)

R	ESIDE	NTIA	L APP	RAISA	L SUN	<b>IMAR</b>	Y RE	PORT		_	U- N- 4	200004	
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	Market Area N		ERIDGE CI		Cooperative	L Oaks		Reference: 52	Δ5	HOA: \$ N		per yes Tract: 412	
Г	The purpose o	of this apprais	al is to develop	an opinion of	: 🔀 Marke	t Value (as d	efined) or	other type o	of value to	lescribe)	CONSU	) II avi. 412	0.0056.12
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L		TRISTA C				Address:	LAS VEG	AS			,		1
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Page #3

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	TAIN BI LIEBION	COMPARABLE ST 9585 SUN DROP	SALE # 1	COMPARABLE		COMPARABLE	SALE # 3
LAS VEGAS	6, NV 89117			9566 SUN DROP		3759 MORNING	CANYON S
Proximity to Subject	2111	APN: 163-18-615-	-026	APN: 163-18-615	-018	APN: 163-18-719	
Sale Price	5	0.60 miles SE	472.00	0.63 miles SE		0.70 miles SE	
Sale Price/GLA		q.ft. \$ 133.65 /sq.ft.	\$ 170,000		\$ 175,000		\$ 172
Data Source(s)	INSPECTION		05000511075	\$ 137.58/sq.ft.	<u> </u>	\$ 117,73/sq.ft.	
Verification Source(s)	COUNTY RECS	DOC# 20090130-			03308/TXSTR		04300/TXS
VALUE ADJUSTMENTS	DESCRIPTION	MLS# 878358 DC DESCRIPTION		MLS# 849978 DO		MLS# 873985 DO	OM 68
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lights Appraised	FEE SIMPLE	COE 1/30/09	<del></del>	COE 9/26/08		COE 12/31/08	
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Site		AVERAGE	<del> </del>	AVERAGE		AVERAGE	
/iew	4,988 SQ.FT.	3,993 SQ.FT.		4,153 SQ.FT.		5,050 SQ.FT.	
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Assumptions, Limiting Conditions & Scope of Work Page #5

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	Property Address: 3354 MOUNTAIN BLUEBIRD STREET City: LAS VEGAS FILENCE: 090301	
	Address: 3254 NO. State: NV 7th Code of	10442
	Appraise: TRISTA CATER Address: 3354 MOUNTAIN BLUEBIRD STREET, LAS VEGAS, NV 89  AND ADDRESS:	9117
i	STATEMENT OF ASSUMPTIONS & LIMITING CONDITIONS  Address:  Address:  Address:  Address:	117

The appraiser will not be responsible for matters of a legal nature that affect either the property being appraised or the title to it. The appraiser assumes that the title is good and marketable and, therefore, will not render any opinions about the title. The property is appraised on the basis

-- The appraiser may have provided a sketch in the appraisal report to show approximate dimensions of the improvements, and any such sketch is included only to assist the reader of the report in visualizing the property and understanding the appraiser's determination of its size. Unless

otherwise indicated, a Land Survey was not performed.

If so indicated, the appraiser has examined the available flood maps that are provided by the Federal Emergency Management Agency (or other data sources) and has noted in the appraisal report whether the subject site is located in an identified Special Flood Hazard Area. Because the appraiser is not a surveyor, he or she makes no guarantees, express or implied, regarding this determination.

The appraiser will not give testimony or appear in court because he or she made an appraisal of the property in question, unless specific arrangements to do so have been made beforehand.

If the cost approach is included in this appraisal, the appraiser has estimated the value of the land in the cost approach at its highest and best use, and the improvements at their contributory value. These separate valuations of the land and improvements must not be used in conjunction with any other appraisal and are invalid if they are so used. Unless otherwise specifically indicated, the cost approach value is not an insurance

The appraiser has noted in the appraisal report any adverse conditions (including, but not limited to, needed repairs, depreciation, the presence of hazardous wastes, toxic substances, etc.) observed during the inspection of the subject property, or that he or she became aware of during the normal research involved in performing the appraisal. Unless otherwise stated in the appraisal report, the appraiser has no knowledge of any hidden or unapparent conditions of the property, or adverse environmental conditions (including, but not limited to, the presence of hazardous wastes, toxic substances, etc.) that would make the property more or less valuable, and has assumed that there are no such conditions and makes no guarantees or warranties, express or implied, regarding the condition of the property. The appraiser will not be responsible for any such conditions that do exist or for any engineering or testing that might be required to discover whether such conditions exist. Because the appraiser is not an expert in the field of environmental hazards, the appraisal report must not be considered as an environmental assessment of

The appraiser obtained the information, estimates, and opinions that were expressed in the appraisal report from sources that he or she considers to be reliable and believes them to be true and correct. The appraiser does not assume responsibility for the accuracy of such items that were furnished by other parties.

- The appraiser will not disclose the contents of the appraisal report except as provided for in the Uniform Standards of Professional Appraisal Practice, and any applicable federal, state or local laws.

— If this appraisal is indicated as subject to satisfactory completion, repairs, or alterations, the appraiser has based his or her appraisal report and valuation conclusion on the assumption that completion of the improvements will be performed in a workmanlike manner.

- An appraiser's client is the party (or parties) who engage an appraiser in a specific assignment. Any other party acquiring this report from the client does not become a party to the appraiser-client relationship. Any persons receiving this appraisal report because of disclosure requirements applicable to the appraiser's client do not become intended users of this report unless specifically identified by the client at the time of the

- The appraiser's written consent and approval must be obtained before this appraisal report can be conveyed by anyone to the public, through advertising, public relations, news, sales, or by means of any other media, or by its inclusion in a private or public database.

An appraisal of real property is not a 'home inspection' and should not be construed as such. As part of the valuation process, the appraiser performs a non-invasive visual inventory that is not intended to reveal defects or detrimental conditions that are not readily apparent. The presence of such conditions or defects could adversely affect the appraiser's opinion of value. Clients with concerns about such potential negative factors

The Scope of Work is the type and extent of research and analyses performed in an appraisal assignment that is required to produce credible assignment results, given the nature of the appraisal problem, the specific requirements of the intended user(s) and the intended user of the assignment results, given the nature of the appraisal procesn, the specific requirements of the interned user(s) and the interned user of the appraisal report. Reliance upon this report propert by the Appraisar, is prohibited. The Opinion of Value that is the conclusion of this report is credible only within the context of the Scope of Work, Effective Date, the Date of Report, the Intended User(s), the Intended Use, the stated Assumptions and Limiting Conditions, any Hypothetical Conditions and/or Extraordinary Assumptions, and the Type of Value, as defined herein. The appraiser, appraisel firm, and related parties assume no obligation, liability, or accountability, and will not be responsible for any unauthorized use of this report or its conclusions.

Additional Comments (Scope of Work, Extraordinary Assumptions, Hypothetical Conditions, etc.):

Certifications Page #8 Property Address: 3354 MOUNTAIN BLUEBIRD STREET GONZALEZ City: LAS VEGAS File No.: 09030 Address: 3354 MOUNTAIN BLUEBIRD STREET, LAS VEGAS, NV 89117 State: NV Zip Code: 89117 TRISTA CATER APPRAISER'S CERTIFICATION I certify that, to the best of my knowledge and belief: - The statements of fact contained in this report are true and correct. The credibility of this report, for the stated use by the stated user(s), of the reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, impartial, and unblased professional analyses, opinions, and conclusions.

— I have no present or prospective interest in the property that is the subject of this report and no personal interest with respect to the parties - I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment. My engagement in this assignment was not contingent upon developing or reporting predetermined results. My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal. - My analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice that were in effect at the time this report was prepared. — I did not base, either partially or completely, my analysis and/or the opinion of value in the appraisal report on the race, color, religion, sex, handleap, familial status, or national origin of either the prospective owners or occupants of the subject property, or of the present - Unless otherwise indicated, I have made a personal inspection of the property that is the subject of this report. - Unless otherwise Indicated, no one provided significant real property appraisal assistance to the person(s) signing this certification. Additional Certifications DEFINITION OF MARKET VALUE \*: Market value means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions Buyer and seller are typically motivated;
 Both parties are well informed or well advised and acting in what they consider their own best interests; 3. A reasonable time is allowed for exposure in the open market;
4. Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and 5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions 15. The price represents the normal consideration for the property sold unaffected by special or creative inflanding or sales concessions granted by anyone associated with the sale.

\* This definition is from regulations published by federal regulatory agencies pursuant to Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989 between July 5, 1990, and August 24, 1990, by the Federal Reserve System (FRS), National Credit Union Administration (NOUA), Federal Deposit Insurance Corporation (FDIC), the Office of Thirt Supervision (OTS), and the Office of Comptroller of the Currency (OCC). This definition is also referenced in regulations jointly published by the OCC, OTS, FRS, and FDIC on June 7, 1994, and in the Interagency Appraisal and Evaluation Guidelines, dated October 27, 1994. E-Mail **GONZALEZ** 3354 MOUNTAIN BLUEBIRD STREET, LAS VEGAS, NV 89117 APPRAISER SUPERVISORY APPRAISER (If required) or CO-APPRAISER (if applicable) Frish Cata Appraiser Name: TRISTA CATER Supervisory or Co-Appraiser Name: Company: C & R APPRAISAL COMPANY Company: Phone: 702-278-6099 Phone: E-Mail: TRISTA5@COX.NET Fax Date Report Signed: Date Report Signed: MARCH 10, 2009
License or Certification #: A.0001127-RES Date Report Signed: State: NV Designation: LICENSED RESIDENTIAL APPRAISER License or Certification #: State Designation: Expiration Date of License or Certification:

MARCH 4, 2009 ☐ Exterior Only Copyrightic 2007 by a ta mode, inc. This form may be reproduced unmodified without written permission, however Form GPRES2AD — "WinTOTAL" appraisal software by a la mode, inc. — 1-800-ALAMODE Date of Inspection: **GP**RESIDENTIAL

Expiration Date of License or Certification:

Interior & Exterior

Inspection of Subject:

6/30/2009

Exterior Only

Minterior & Exterior

Inspection of Subject:

Date of Inspection:

Bonowe/Cijent N/A Supplemental Addendum	Page #7
Fighty Address 3354 MOUNTAIN BLUERIND STREET	
CHERK GONZALEZ COUNTY CLARK	
State NV Zip Code 89117	

### **URAR: Additional Features**

Concrete driveway and sidewalks, blockwall fencing, covered porch, blockwalls, front and rear landscaping with automatic sprinklers, mow curbs, ceiling fans, crown molding, shutters, mirrored closet doors, walk-in closet in master

• <u>URAR: Neighborhood Market Factors</u>
Las Vegas has a tourist-based economy. The service industry, which includes hotels, gaming, and recreation, accounts for over Las Vegas has a tourist-based economy. The service industry, which includes notes, garning, and recreation, eccounts for or 30% of the employment within the city. Nellis Air Force Base, the Nevada Test Site, and several industrial and manufacturing Solve employment within the city. Neits Air Force base, the nevada rest Site, and several industrial and manufacturing plants are other main sources of employment. Also included are the secondary levels of support employment that are typical for a community with the size and population of the Las Vegas area. Growth in the Las Vegas valley remains constant adding to

Most of the competition for the subject will come from new tract development. Due to the tremendous growth in the Las Vegas Valley, new development will directly compete with both existing and other new development. The subject neighborhood is these areas.

### URAR: Sales Comparison Comments

This submarket was searched extensively and the comparable sales selected are considered the most similar to the subject in the current time frame. Any comparable which sold/closed escrow more than six months from the date of inspection was used the current time frame. the current time frame. Any comparable which solorclosed escruw more treat six months from the date of inspection was used due to a lack of any better/more recent sales in this submarket. Furthermore, any dated sale used is still a reliable indicator of current market value. All of the comparable sales are from within the subject subdivision or from the most proximate competing market areas. All line item adjustments are either market extracted and represent what informed purchasers are willing to pay for those items, or , when ideal "matched pair" sales are unavailable and no market extraction is possible, adjustments are derived from the cost new of the item, less all forms of depreciation. No value has been assigned to any personal property or

in order to develop a reasonable analysis for the value of the property, a review of sales data from several sources was conducted. This investigation included the Multiple Listing Service as well as the county records and appraiser's files. Competing listings were also reviewed to determine the current competition and establish the upper limits of value in this submarket. The information provided herein is deemed to be accurate based on the sources cited.

### URAR: Final Reconciliation

Greatest weight has been placed on the Sales Comparison Analysis as the actions of buyers and sellers are reflected therein. There is insufficient rental data to produce consistent conclusions about market rent and gross rent multipliers and, therefore, the Income Approach was omitted. I am aware of the changes made by USPAP to the appraiser's certification and will abide by those changes. I have no bias in respect to the subject property.

### Additional Comments:

All electronic signatures on this report have a security feature maintained by individual passwords for each signing appraiser. No person can after the appraisal with the exception of the original signing appraiser(s).

Su	bject	Pho	\f^e

Borrower/Client N/A	Subject Photos		Page #8
Property Address 3354 MOUNTAIN BLUEBIRD STREET  City LAS VEGAS			
Client GONZALEZ G	DUMBY CLARK	State NV Zin Cod	89117
			89117



Subject Front 3354 MOUNTAIN BLUEBIRD ST



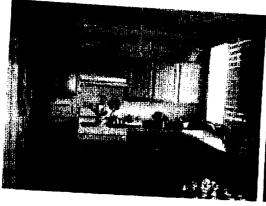
Subject Rear

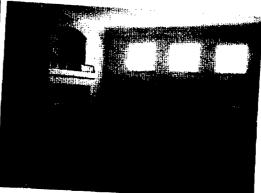


Subject Street

## Photograph Addendum

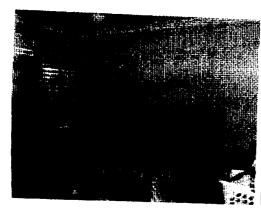
Borrower/Ciert N/A Photograph Addendum	Page #9
Triberry Address 3354 MOUNTAIN BLUERIPD STREET	
Client GONZALEZ County CLARK	
State NV Zip Code 89117	

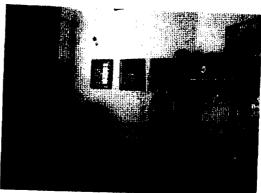




KITCHEN

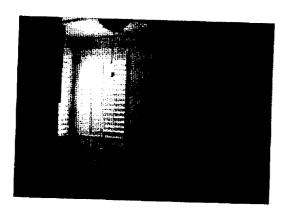
**FAMILY ROOM** 





**BEDROOM** 

BEDROOM



BEDROOM

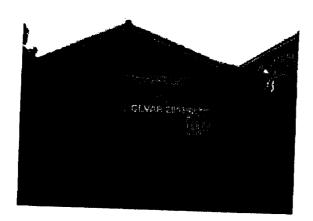
Comparable Photo Page

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bonowa/Chari N/A
Property Address 3354 MOUNTAIN BLUEBIRD STREET
The state of the s
UNY LAS VEGAS
State NV Zip Code 89117
37 0000 6911/



Comparable 1 9585 SUN DROP COURT.



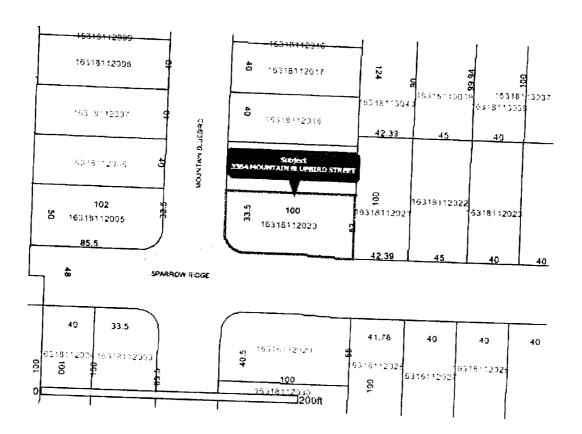
Comparable 2 9566 SUN DROP COURT



Comparable 3
3759 MORNING CANYON ST.

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IPane #	11

Borrower/Client N/A Plat Map	Page #11
Property Address 3354 MOUNTAIN BLUEBIRD STREET  City LAS VEGAS	
Client GONZALEZ COUNTY CLARK	Code 89117



Form MAP.LOC --- "WinTOTAL" appraisal software by a la mode, inc. --- 1-800-ALAMODE

Name Date: July 14, 2507

Is the business address stated have us unless the fivence is some r revolved, and the issue date to the expiration date at the business address stated have us unless the fivence is some r revolved, and drd, withdrawn, or invalidated.

Fipure Date: June 30, 3:169

Page #13

## APPRAISER LICENSE

# VOI TRAVAID RABID STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY

This was Certify That: TRISTAR CATER

REAL ESTATE DIVISION

VOTTRANSFERABLE

1 (cense Number: A (f0)) (274) S

EM J WHREN

REAL ESTAIN BILLISTON

CENTY SOUR ROLE & APPRAINT CHANGE ON APPRIL.

In without whiteful THE BEPARTABALOF BENINESS AND INDUSTRY, REAL FOLLIE BIASEAN, be retained the authority verted in it by Chipper 644, of the Nevada Revord Nature, his valued likelicence to be insued with the Nath France that then about the completional displayed in place of business.

Form SCNLGL — "WinTOTAL" appraisal software by a la mode, inc. — 1-800-ALAMODE